MOTION FILED

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No. 82-33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE HELEN MINING COMPANY, AND
KENTLAND-ELKHORN COAL CORPORATION,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

and

UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF CEDAR COAL COMPANY, CENTRAL APPALACHIAN COAL COMPANY, CENTRAL OHIO COAL COMPANY, PRICE RIVER COAL COMPANY, SOUTHERN APPALACHIAN COAL COMPANY, SOUTHERN OHIO COAL COMPANY, AND WINDSOR POWER HOUSE COAL COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Cedar Coal Company, Central Appalachian Coal Company, Central Ohio Coal Company, Price River Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Power House Coal Company, move the Court, pursuant to Rules 36 and 42 of the Rules of the Supreme Court of the United States, for leave to file the accompanying Brief *Amici Curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed with this Court on July 8, 1982, by Petitioners, The Helen Mining Company and Kentland-Elkhorn Coal Corporation, and to be allowed to appear in the matter as *amici curiae* if certorari is granted. Petitioners, Helen Mining Company and Kentland-Elkhorn Coal Corporation, have consented to the filing. Likewise, Respondent, Secretary of Labor, through the Solicitor General of the United States, has consented to the filing; but the other

Respondent, United Mine Workers, of America, has refused to consent.[1]

NATURE OF THE INTEREST OF PROPOSED AMICI AND REASONS LEAVE FOR SUCH FILING IS DESIRABLE

Cedar Coal Company, Central Appalachian Coal Company, Central Ohio Coal Company, Price River Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Power House Coal Company [hereinafter referred to collectively as "AEP Companies"] are subsidiary corporations wholly owned by utility companies, in turn, owned by American Electric Power Company, Inc., a public utility holding company,[2] and operate approximately thirty underground and surface coal mines throughout the United States. Affiliated companies in the American Electric Power Company System service nearly two and one-half million residential and industrial utility customers in a seven state region and also are interconnected with other utility companies which provide electric power to customers in the eastern United States. The AEP Companies as a group constitute one of the largest coal producers in the United States, and the American Electric Power System is the largest user of coal in the United States. Because of this very substantial involvement in the production of coal, and the intensive use of coal by their various affiliated companies, the AEP Companies are vitally interested in the issues to be decided by the Court in this proceeding.

The Helen Mining Company and Kentland-Elkhorn Coal Corporation's Petition for a Writ of Certiorari seeks review, pursuant to this Court's jurisdiction under 28 U.S.C. § 1245(1), of the split panel decision of the District of Columbia Circuit Court of Appeals in *United Mine Workers of America* v.

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[1] The consent of Petitioners, The Helen Mining Company and Kentland-Elkhorn Coal Corporation, and of the Solicitor General of the United States on behalf of the Respondent, Secretary of Labor, appear as Appendices A and B, respectively.

[2] The listing of parent and affiliated corporations, as required by Rule 28.1 to be included in this Motion, is set forth in Appendix C.

Federal Mine Safety and Health Review Commission, 671 F.2d 615 (D.C. Cir. 1982) ["Decision"]. That Decision interpreted a provision of the Federal Mine Safety and Health Act of 1977 [the "Act"], 30 U.S.C. § 801 *et seq.* – specifically, § 103(f) [30 U.S.C. § 813(f)] – as entitling miners' representatives to payment of their regular wages for the time they spend accompanying inspectors of the Secretary of Labor, Mine Safety and Health Administration ["MSHA"] during so-called "spot inspections" in addition to the payments received for time accompanying MSHA Inspectors during "regular inspections."[3]

Since the Decision, MSHA has initiated enforcement of that single judicial interpretation of § 103(f).[4] MSHA's enforcement activities have resulted in numerous citations being issued under § 104 of the Act [30 U.S.C. § 814] and the threatened issuance of withdrawal orders under that same provision. The AEP Companies have received several such citations under § 104(a) of the Act and threats of the issuance of withdrawal orders. Three of those citations are currently being contested by three of the AEP Companies related to mines located in the Fourth, Sixth, and Tenth Judicial Circuits.

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[3] The term "spot inspection" now has the accepted meaning – among MSHA and non-governmental personnel in the mining industry – of an inspection other than the four inspections of the entire mine facility required by § 103(a) of the Act [30 U.S.C. § 813(a)] to be conducted each year in underground mines. The particular types of "spot inspections" at issue in the consolidated cases below were "spot inspections" under § 103(i) [30 U.S.C. § 813(i)], with respect to Helen Mining and Allied Chemical, and a "specialized electrical inspection," regarding Kentland-Elkhorn. The Act also specifically provides for other "spot inspections." See, *e.g.*, § 103(g)(1) [30 U.S.C. § 813(g)(1)], § 202(g) [30 U.S.C. § 842(g)], and § 303(x) [30 U.S.C. § 863(x)]. The label "regular inspections" – which at the AEP Companies' mines typically are conducted nearly every working day over each three month calendar period – has been attached to the statutorily-mandated, four inspections each year of the entire mine facility under § 103(a). See, *e.g.*, MSHA's *Coal Mine Health and Safety Manual* (1978) at pp. I-113 to I-125, which appears as Appendix D.

[4] The MHSA directive for enforcement of that Decision throughout the mining industry is set out in Appendix E.

Federal Mine Safety and Health Review Commission Docket Nos. WEST 82-166-R; LAKE 82-76-R; WEVA 82-243-R.[5]

MSHA's actions based upon this Decision have placed a substantial economic and operational burden upon the AEP Companies – and the mining industry generally – which exceeds that envisioned or intended by Congress in its enactment of this statute. Thus, the involvement of the AEP Companies as *Amici* will serve to appropriately demonstrate that the issues presented in the Decision as to which review is sought involve more than a discrete set of facts in a particular case and are not "academic" or "episodic" problems. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 233, 225 n.2 (1975); *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1954).

Until a final and proper resolution of the issues presented herein is reached, the AEP Companies and the entire mining industry are confronted with the dilemmatic choice of:

(1) bearing the burden and injury of making payments to representatives of miners under the compulsion of what the AEP Companies believe to be an improper application of the law with a substantial cloud on the likelihood of recouping such payments [*see, CF&I Steel Corp.* v. *Morton*, 516 F.2d 868 (10th Cir. 1975); *GEX Colorado, Inc.*, 2 FMSHRC Decisions 3503 (1980) and 2 FMSHRC Decisions 3494 (1980)]; or

(2) subjecting themselves to the repeated issuance of citations or withdrawal orders under § 104 of the Act, thereby creating violation histories, which in turn, magnify the penalties in other matters [30 U.S.C. §§ 815(b), 820(i); 30 C.F.R. § 100.3(a) and (c)]; or

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[5] Additionally, one of the AEP Companies had prevailed on the pay entitlement question before the Federal Mine Safety and Health Review Commission [*Southern Ohio Coal Co.*, 4 FMSHRC Decisions 72 (1982)], and the Secretary of Labor had sought review before the District of Columbia Circuit. Following its Decision below, however, the Circuit Court remanded that case to the Commission for further proceedings. D. C. Circuit Case No. 81-2299, April 27, 1982.

(3) incurring further expenses in defending against the same improper application of the law while at the same time having to pay to abate citations rather than being subjected to withdrawal orders [30 U.S.C. § 814].

This is a hardship which the AEP Companies, in particular – and the mining industry, generally – have suffered and will suffer further due to MSHA's continued application of this erroneous Decision; and the impact of this Decision reaches far beyond merely the tpyical facts and individual Petitioners involved here. These important questions of federal law are matters of substantial and nationwide importance as to which this Court's resolution is both appropriate and necessary, and as to which the AEP Companies can provide a vantage point in addition to that already brought to the proceeding by the Petitioners.

For all of the foregoing reasons, the AEP Companies submit that they should be granted leave to file their accompanying Brief *Amici Curiae* and leave to appear in this proceeding as *Amici Curiae* if certiorari is granted.

Respectfully submitted,

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I. INTEREST OF AMICI.

Cedar Coal Company, Central Appalachian Coal Company, Central Ohio Coal Company, Price River Coal Company,

Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Power House Coal Company [hereinafter collectively referred to as "AEP Companies"] are wholly owned subsidiary corporations of utility companies, in turn, owned by American Electric Power, Inc., a public utility holding company. The AEP Companies operate coal mines throughout the United States and, together, constitute one of this country's largest coal producers. Companies in the American Electric Power System provide electric service to nearly two and one-half million residential and industrial utility customers and, as a group, form the largest user of coal in the country. Because of this strategic involvement in the production and use of this nation's coal, the AEP Companies are acutely concerned with the determination of the issues before the Court in this proceeding. During the past decade, the AEP Companies have been at the forefront of matters involving the application and interpretation of federal and state mine safety laws in matters such as responding to public requests of the Secretary of Labor, Mine Safety and Health Administration ["MHSA"] and the Federal Mine Safety and Health Review Commission ["Commission"] for input which has been incorporated in the drafting of procedural rules used by both and in the development of decisional law in the mine safety field.

On April 25, 1978, MSHA had issued an Interpretive Bulletin which, among other matters, interpreted §§ 103(a) and 103(f) [30 U.S.C. §§ 813(a) and 813(f)] of the Federal Mine Safety and Health Act of 1977 [the "Act"], 30 U.S.C. § 801 *et seq.*, as entitling miners' representatives to their regular compensation for "spot" as well as "regular inspections." 43 Fed. Reg. 17546 (April 25, 1978). Because of the Commission's role as an expert adjudicative body charged with reviewing MSHA's enforcement practices under the Act, Judge Gessel of the District Court for the District of Columbia dismissed a judicial challenge to MSHA's Interpretative Bulletin, primarily in order to permit the Commission to exercise its

expertise in resolving the issue before any judicial review. *Bituminous Coal Operators' Ass'n., Inc.* v. *Marshall*, 82 F.R.D. 350 (D.D.C. 1979).

Following this deferential treatment by Judge Gessel, all of the Commission's decisions regarding these statutory provisions uniformly held that MSHA's attempted interpretation was unsupported by the legislative history of the Act and erroneous as a matter of law. *Helen Mining Co.*, 1 FMSHRC Decisions 1796 (1979); *Kentland-Elkhorn Corp.*, 1 FMSHRC Decisions 1833 (1979); *Allied Chemical Corp.*, 1 FMSHRC Decisions 1947 (1979). And, based upon those rulings, summary decision, pursuant to 29 C.F.R. § 2700.64, was granted in several cases presenting this same issue. See, *e.g.*, *Southern Ohio Coal Co.*, 4 FMSHRC Decisions 72 (1982); *Island Creek Coal Co.*, 2 FMSHRC Decisions 1983 (1980); *Alabama By-Products Corp.*, 2 FMSHRC Decisions 467 (1980); *Princess Susan Coal Co.*, 2 FMSHRC Decisions 69 (1980).

Following the split panel decision below in *United Mine Workers of America* v. *Federal Mine Safety and Health Review Commission*, 671 F.2d 615 (D.C. Cir. 1982) ["*UMWA* v. *FMSHRC*"], which held that miners' representatives have a right to be compensated for the time spent accompanying MSHA Inspectors during "spot inspections," as well as "regular inspections,"[1] MSHA resurrected its prior interpretative policy [Appendix E]. MSHA's enforcement of this unique interpretation of § 103(f) has resulted in the imposition against mine operators throughout the country of countless citations under § 104 of the Act [30 U.S.C. § 814] and the threat of imposition of withdrawal orders under that same section.

MSHA has issued several such citations against the AEP Companies and threatened the issuance of withdrawal orders. Three of those citations, related to mines located in the Fourth, Sixth, and Tenth Circuits, are being contested before the

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[1] See Motion for Leave to File Brief *Amici Curiae*, footnote 3.

Commisison.[2] Prior to *UMWA* v. *FMSHRC*, the Secretary of Labor had sought review in the District of Columbia Circuit of a Commission decision in which one of the AEP Companies had prevailed on the issue of "spot inspection" pay entitlement.[3] After *UMWA* v. *FMSHRC*, that case was remanded to the Commission.[4]

II. SUMMARY OF ARGUMENT

The issues presented by the Petition for A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision in *United Mine Workers of America* v. *Federal Mine Safety and Health Review Commission*, 671 F.2d 615 (D.C. Cir. 1982), concern important questions of federal law involving the interpretation and application of a relatively new statute – the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* – which is national in scope. And, those issues relate both to concerns typified by the particular circumstances here and to matters involving substantial sums of money.

In blatant disregard of the repeated directions of this Court, the split panel majority failed to avail itself of clear and conclusive legislative history and failed to consider other relevant provisions of the Federal Mine Safety and Health Act of 1977 in determining the interpretation and application of the particular portion of the statute involved – 30 U.S.C. § 813(f).

Additionally, that majority's decision refused to grant any deference to the determination of the Federal Mine Safety and Health Review Commission and ignored the role envisiond and designed for that Commission by Congress under the statute. Thus, the decision further conflicts with decisions of

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[2] Commission Docket Nos. WEST 82-166-R [*Price River Coal Co.*], LAKE 82-76-R [*Southern Ohio Coal Co.*], and WEVA 82-243-R [*Windsor Power House Coal Co.*].

[3] *Southern Ohio Coal Co.*, 4 FMSHRC Decisions 72 (1982).

[4] D.C. Circuit Case No. 81-2299, April 27, 1982.

this Court and conflicts with those of the Third, Fourth, and Eighth Judicial Circuits.

III. REASONS FOR GRANTING THE WRIT

Petitioners, The Helen Mining Company and Kentland-Elkhorn Coal Corporation, have presented two important questions for review by this Court:

> 1. Whether the court of appeals' decision ignoring clear, authoritative, and dispositive legislative history in the face of an ambiguous statute was contrary to this Court's numerous holdings that legislative history is always relevant to discerning the meaning of a statute.
>
> 2. Whether the court of appeals erred in refusing to grant any deference to the decision of the Federal Mine Safety and Health Review Commission, the expert agency Congress created to interpret the Mine Act.
>
> Petition for Writ of Certiorari at p. iii.

The AEP Companies support Petitioners' position on each of these issues.

This Court has recognized repeatedly that its authority to review decisions of other courts under its jurisdiction to grant a writ of certiorari, 28 U.S.C. § 1254, should be exercised in cases involving "seemingly important questions of federal law." *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394, 399 (1974). Through the years, the important circumstances warranting the exercise of that authority have included: determining the effect of a section of the Longshoremen's and Harbor Workers' Act because of its national scope and a decision respecting its enforcement provided a precedent of general application [*Del Vecchio* v. *Bowers*, 296 U.S. 280, 285 (1935)]; determining whether a reviewing court had invaded the statutorily conferred duties of an administrative agency so that those duties could not be fulfilled [*NLRB* v. *Waterman Steamship Corp.*, 309 U.S. 206 (1940)];

determining an individual case which is typical of a problem important and general enough to warrant the attention of the Court's supervisory power [*Stack* v. *Boyle*, 342 U.S. 1, 13 (1951) (Separate Opinion of Mr. Justices Jackson and Frankfurter)]; construing a statute of nationwide importance – which is "among the most important issues for final determination of this Court" [*Kernan* v. *American Dredging Co.*, 355 U.S. 426, 441 (1958) (Memorandum of Mr. Justice Frankfurter)]; reviewing a decision which was treated as precedential in the consideration of matters involving substantial sums of money [*United States* v. *Chicago, Burlington & Quincy R.R. Co.*, 412 U.S. 401, 404 (1973)]; resolving "a seemingly important issue involving the construction of . . . [a] relatively new federal statute" [*United States* v. *Kahn*, 415 U.S. 143, 150 (1974)]; and reviewing a split panel decision of the District of Columbia Circuit setting aside the ruling of a federal commission when the validity of that ruling is of obvious importance [*FPC* v. *Texaco, Inc.*, 417 U.S. 380 (1974)].

This myriad of important circumstances warranting the granting of certiorari all meld in the present situation as to which review is sought.

MSHA's enforcement activities, predicated on *UMWA* v. *FMSHRC*, have worked a substantial financial and operational burden – clearly exceeding that envisioned and intended by Congress at the time it passed the Act – not only upon Petitioners, but also upon the AEP Companies and the nation's mining industry, generally.

Unless and until a proper and final determination regarding the questions herein presented is reached by this Court, the AEP Companies and the nation's mining industry will continue to be confronted with an irreconcilable dilemma. They must: either make payments to miners' representatives under the compulsion of an improper application of the law under circumstances in which recovery of those funds is questionable [*see, CF&I Steel Corp* v. *Morton*, 516 F.2d 868 (10th Cir. 1975); *GEX Colorado, Inc.*, 2 FMSHRC Decisions 3503

(1980) and 2 FMSHRC Decisions 3494 (1980)]; or subject themselves to the repeated issuance of citations or withdrawal orders under § 104 of the Act, thereby creating violation histories which consequently magnify the amounts of penalties in other matters [30 U.S.C. §§ 815(b), 820(i); 30 C.F.R. §§ 100.3 (a) and (c)]; or incur additional expenses in defending against that improper application of the law while having to pay to abate citations to avoid the imposition of withdrawal orders [30 U.S.C. § 814].

The impact of this erroneous split panel decision of the District of Columbia Circuit, regarding the interpretation of a novel statute of nationwide importance, clearly reaches far beyond merely the Petitioners. *Teleprompter, supra; Del Vecchio, supra; Kernan, supra; Kahn, supra; Texaco, supra.* Moreover, it is equally evident, as discussed below, that the possibility of divergence among the various Judicial Circuits regarding the questions of interpretation and the proper function of a reviewing court is quite real. *Waterman, supra; Stack, supra.* And, review by this Court now can ensure appropriate uniformity of the proper application of the law throughout the nation without relegating the mining industry to the position of bearing weighty operational and financial burdens while awaiting the development of a conflict among the Circuits on the specific interpretation of this statute. *Del Vecchio, supra; Kernan, supra; Chicago, Burlington & Quincy, supra.* Therefore, the requested Writ should issue to review these substantial and acutely important questions of federal law.

1. The Court of Appeals' Decision Directly and Irreconcilably Conflicts With the Repeated and Explicit Directions of This Court.

In reaching its Decision, the split panel majority conceded that "the scope of a miners' representative's right to participate in mine inspections, and his right to do so without loss of pay, are governed *exclusively* by subsections (a) and (f) of section

103 of the Act." *UMWA* v. *FMSHRC*, 671 F.2d at 619 [Emphasis Supplied].[8]

That majority – in an opinion written by District Judge Greene, to which Circuit Judge Wald filed a concurring opinion and Circuit Judge Tamm filed a vigorous dissenting opinion – further conceded that the phrase "pursuant to the provision of subsection (a)" in § 103(f) of the Act "may well be ambiguous." 671 F.2d at 621. Yet, it ruled that the Commission erred in even considering legislative history – specifically the statements of Congressman Carl Perkins which form clear, relevant, and the *only* direct legislative history available regarding the provisions of § 103(f) concerning entitlement to pay for participation in "spot inspections." *Id.* at 622.

Representative Perkins' specific and unambiguous statements, in connection with the Conference Substitute Bill which became the present Act, regarding the pertinent operation of § 103(f), were:

> Mr. Speaker, before concluding my remarks I would like to address one aspect of the conference report that seems to be somewhat ambiguous.
>
> Section 103(a) of the conference report provides that
>
> . . .
>
> [i]n carrying out the requirements of clauses (3) and (4) – concerning imminent dangers or compliance with standards – the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year and of each surface coal or other mine in its entirety at least two times a year.
>
> In addition to the regular inspections of each mine in its entirety as specified in section 103(a), section 103(g)(1) provides that whenever a representative of

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[8] Sections 103(a) and 103(f) appear as Appendices F and G, respectively.

a miner, or a miner at a mine where there is no such representative, has reasonable grounds to believe that a violation or imminent danger exists, such representative or miner shall have a right to obtain an immediate inspection. Further section 103(i) provides for additional inspections for any mine which liberates excessive quantities of methane or other explosive gases, or where a methane or gas ignition has resulted in death or serious injury, or there exists some other especially hazardous condition.

Section 103(f) provides that a miners' representative authorized by the operator's miners shall be given an opportunity to accompany the inspector during the physical inspection and pre- and post-inspection conferences pursuant to the provisions of subsection (a). Since the conference report reference is limited to the inspections conducted pursuant to section 103(a), and *not* to those pursuant to section 103(g) or 103(i), *the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the Federal inspector*, including pre- and post-[inspection] conferences, *at no loss of pay only during the four regular inspections of each underground mine* and two regular inspections of each surface mine *in its entirety* including pre- and post-inspection conferences.

• • •

Section 103(h) of the 1969 act provided generally that —

At the commencement of *any inspection* . . . the authorized representative of the miners at the mine . . . shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

Since the conference report does *not* refer to *any inspection*, as did section 103(h) of the 1969 act, but, rather to an inspection of any mine *pursuant* to subsection (a), it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay *only* for the regular inspections mandated by subsection (a),

and *not* for the additional inspections otherwise required or permitted by the act. [Emphasis supplied.]

> 123 Cong. Rec. 35410 (1977), *reprinted in Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977* at 1356-58 (1978). ["Legis. Hist."]

At the time of the delivery of the typically influential Report of the Congressional Conference Committee to the House of Representatives, Congressman Perkins was widely known and respected as one of the foremost proponents of improved federal mine safety laws, the chief sponsor of the House version of the 1977 revisions to the federal mining laws, chairman of the Joint Conference Committee, and Chief House Conferee, in addition to his role as one of the primary movers in the enactment of the Federal Coal Mine Safety Act of 1969 – the predecessor to the present Act. *UMWA* v. *FMSHRC*, 671 F.2d at 620, 634-35.

The key focus of the varying opinions regarding entitlement to compensation during "spot inspections" essentially has been on an interpretation of whether "spot inspections" are "made pursuant to the provisions of subsection (a)" of § 103, as required by § 103(f). Congressman Perkins' statements – ignored by the Court of Appeals majority – clearly resolve that issue in the negative.

In ascertaining the limits which Congress intended to place on the miners' representative's right to be compensated for walkaround activities during a "spot inspection," it was incumbent upon the Court of Appeals to heed this Court's direction that "care must be taken, however, to respect the limits up to which Congress was prepared to enact a particular policy." *United States* v. *Sisson*, 399 U.S. 267, 298 (1970). The pursuit of this objective, even in the face of no ambiguity in a statute, properly involves a consideration of "other parts of the Act and legislative history" to avoid defeating the intent of the legislative body. *Helvering* v. *New York Trust Co.*, 292 U.S.

455, 464 (1934). *See also, Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 157 (1972).

As earlier held by this Court,

> It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists.
>
> *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928).

Consonantly, this Court has uniformly concluded that the meaning to be ascribed to a statute can only be derived from a considered weighing of *every* relevant aid to construction. *United States* v. *Dickerson*, 310 U.S. 554 (1940); *accord*, Chief Justice Marshall's statement in *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1804) "where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived"; *see also, Cass* v. *United States*, 417 U.S. 72, 78-79 (1974); *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479 (1942).

Consistent with that developed principle, this Court has stated more recently that:

> As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Assns.*, 310 U.S. 534, 543-544 (1940) (footnotes omitted). See *Cass* v. *United States*, 417 U.S. 72, 77-79 (1974). See generally Murphy, Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Col. L. Rev. 1299 (1975).
>
> *Train* v. *Colorado Pub. Int. Research Group*, 426 U.S. 1, 10 (1976).

In the present case — setting aside the demonstration of

the meaning of § 103(f) which is apparent in the logic and language of the particular section itself, the language of other sections of the Act, and that of other interrelated statutes – the Court of Appeals majority inexplicably and incorrectly chose to ignore the very persuasive evidence available in the Act's legislative history. By failing to avail itself of the presentation by Representative Perkins – one who was intimately involved in the final formulation of the language of the Act and whose uncontradicted remarks clearly and specifically answered the central issue presented in this case – the majority below is in direct conflict with this Court's repeated holdings.

The contention that the general, remedial purpose of the Act mandates a rejection of the Congressionally intended limitation clearly articulated in Congressman Perkins' remarks does not suffice to reduce its proper impact.[6] This Court has stated directly that "care must be taken, however, to respect the limits up to which Congress was prepared to enact a particular policy," *United States* v. *Sisson*, 399 U.S. at 298, and that no court is free to ignore statutory limitations merely because it finds they are "unsuited to achieving the general purpose in a particular case," *Commissioner* v. *Gordon*, 391 U.S. 83, 93 (1968). Thus, to interpose the generalized purpose of the Act in an attempt to defeat the execution of the clear Congressional intent regarding a specific section – as enunciated by one who considered, discussed, and represented the views of those who prepared the final legislative package –

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[6] Any attempt to shroud the Decision below under the protective cloak of application of the axiom of statutory construction of utilizing the most liberal interpretation of remedial legislation is, in the circumstances of this case, unavailing as further conflicting with the decisions of this Court:

> "[a] canon of construction is not a license to disregard clear expressions of congressional intent." *DeCotrau* v. *District County Court*, 420 U.S. 425, 447 (1975).
>
> *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 619 (1980).

> impermissibly crosses the line that divides construction of a statute to effectuate the will of Congress from construction intended to achieve the preferable policy conclusion.
>
> *UMWA* v. *FMSHRC*, 671 F.2d at 627.

Moreover, if – as was assumed by the majority below as the pivotal basis for its Decision – the Congressional intent was to provide as broad as possible miner participation commingled with pay for participation in all inspections, the statutory limitation to pay for a single representative (although participation by others may be necessary and allowed) and the limitation to "no loss in pay" (rather than a direction to pay) [*UMWA* v. *North American Coal Corp.*, 3 FMSHRC Decisions 1428 (1981)] would be incongruous.

As discussed above, clarity or lack of ambiguity[7] does not prevent resort to construction guidance from the legislative history of the Act. Moreover, the issue of the meaning of § 103(f) has been resolved discordantly by a number of judicial officers. On the one hand, several Administrative Law Judges of the Commission, three members of the Commission, and a Judge of a United States Court of Appeals have concluded that § 103(f) gives a narrow right of pay entitlement; and on the other hand, one Administrative Law Judge of the Commission, two members of the Commission, a United States District Judge, and a Judge of a United States Court of Appeals have concluded – for differing reasons – that the right is broader. That situation, in and of itself, aptly manifests the ambiguity of the statute warranting resort to the clear language of a proponent of the legislation who was representing the intention of

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[7] Somewhat contradictorily, the majority in *UMWA* v. *FMSHRC* concluded that the statute was clear and unambiguous when finding error in the Commission's consideration of Congressman Perkins' remarks, 671 F.2d at 620-623, but elsewhere found the statute "subject to three interpretations," *id.* at 619, "may well be ambiguous," *id.* at 621, and "not wholly unambiguous," *id.* at 623.

the Conference Committee members of both chambers of Congress in offering the legislation.

It is worthy of emphasis to note that Congressman Perkins' remarks were not made by an uninvolved legislator or one who, as a matter of legislative subterfuge, attempted to "load up" the legislative history with self-serving statements after failing to achieve an end, as was implicitly suggested by the majority in *UMWA* v. *FMSHRC*, 671 F.2d at 622-623. Rather, these were the remarks of a deeply involved legislator who had participated intimately in the final preparation of the bill which became law and who has an undeniable record of advancing and supporting legislation augmenting the rights of persons employed in mines. *See*, 2A *Sutherland on Statutory Construction* § 48.14 at 220 (4th ed. 1973).

Apart from the dispositive legislative history of the Act, support for the conclusion that only "regular inspections" – and *not* "spot inspections" – are made "pursuant to the provisions of" § 103(a) has been found in "the logic of the language of subsection 103(a) itself" and the language and relationship of other sections of the Act. *See, e.g., UMWA* v. *FMSHRC*, 671 F.2d at 630-631; *Helen Mining Co.*, 1 FMSHRC Decisions 1796, 1802 (1979).

Summarily stated, those bases of support demonstrate that: 1) a contrary construction of "pursuant to" – under which both "regular inspections" and "spot inspections" are found to be authorized by § 103(a) – destroys any substantive meaning for that phrase; 2) authorizations for "spot inspections" exist in other sections of the Act – *e.g.*, §§ 103(g) and (i); and 3) construing the phrase "pursuant to" as a circumscription of the "regular inspections" specifically mandated by § 103(a) gives play to the Congressional forbearance from use of the term "any inspection" in § 103(f) as Congress simultaneously used it in at least six other related portions of the Act – § 103(a); § 103(g)(2) [30 U.S.C. § 813(g)(2)]; § 104(d)(1) [30 U.S.C. § 814(d)(1)]; § 104(e)(1) [30 U.S.C. § 814(e)(1)]; § 104(g)(1) [30 U.S.C. § 814(g)(1)]; and § 107(a) [30 U.S.C. § 817(a)]. *Ibid.*

Drawing support from those bases is a fundamental application of certain axiomatic principles of statutory construction adhered to by this Court – *e.g.*, the primary function in statutory construction is to ascertain and declare the intention of the legislature [*United States* v. *Cooper Corp.*, 312 U.S. 600 (1941)]; in interpreting a statute, care must be taken so as to give effect to the statute as a whole [*United States* v. *Menasche*, 348 U.S. 528, 538-539 (1954); *United States* v. *Campos-Serano*, 404 U.S. 293, 301, n.14 (1971)]; an interpretation should be avoided, whereby the statute or provision being construed is defeated or rendered insignificant or meaningless [*ibid.*]; and significance and effect should be accorded every part of a statute, including every clause [*United States* v. *Fisher*, 109 U.S. 143 (1883)]. However, the majority below ignored each of these principles from this Court's decisions.

In addition to its other errors of interpretation, its lack of consideration of other pertinent provisions of the Act, and its ultimate conclusion, "to the extent that the Court of Appeals excluded reference to the legislative history [of the Act] . . . in discerning its meaning, the court was in error," *Train* v. *Colorado Pub. Int. Research Group*, 426 U.S. at 9-10. Therefore, its Decision should be reviewed on certiorari and reversed.

2. By Concluding that the Commission's Prior Decisions Were Entitled to No Deference, this Decision Conflicts With the Decisions of this Court, Creates a Conflict Among the Circuits, and Ignores the Congressional Scheme that Established the Commission as the Ultimate Administrative Review Body for the Purpose of Developing a Uniform and Comprehensive Interpretation of the Act.

Beyond its failing to heed the only available relevant legislative history which unequivocally demonstrated Congress' intent with respect to its enactment of § 103(f) of the Act, the Court of Appeals majority erroneously concluded that the Commission's decision was entitled to "no deference." *UMWA*

v. *FMSHRC*, 671 F.2d at 623, n. 26. In examining this error warranting review, it is helpful to examine the history of the Commission, the purpose for which it was established, and the reasons the majority below should have found the Commission's well-reasoned construction of § 103(f) to be entitled to great deference rather than absolutely none.

The history and design of the Commission, and the purpose for which it was established was concisely summarized in *Helen Mining Co.*, 1 FMSHRC Decisions 1796 (1979). There, the Commission noted that the arrangement formerly existing under the Federal Coal Mine Safety and Health Act of 1969 was among the alternatives considered and rejected by the Senate Committee which drafted the bill from which the ultimate establishment of an independent Commission evolved. Under the 1969 statute, standard setting, investigation, prosecution, and adjudication responsibilities were all combined in the Secretary of the Interior. *Id.* at 1799.

> The Senate committee followed instead the example that Congress had set under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. That statute established the Occupational Safety and Health Review Commission, which has been recognized as an independent agency with a law- and policy-making role. . . . The Senate committee bill thus established this Commission under the 1977 Act as an independent agency with an express policy role. Senator [Harrison] Williams, the chief architect of the Senate bill, confirmed the important role of the new Commission, when, while introducing the Senate bill, he stated to the Senate that under the bill "[t]he procedure for determining operator responsibility and liability is assigned to a truly independent . . . Commission . . ." 1977 Legis. Hist. at 89. [Footnotes omitted.]
>
> *Id.* at 1799-1800.

The Court of Appeals majority's conclusion – that the Commission's decision on pay entitlement was entitled to "no de-

ference" – as well as being clearly erroneous,[8] is in direct conflict with decisions of this Court on the deference to be given to statutory construction by the responsible administrative agency and prior holdings of a number of other Circuits regarding the proper deference to be shown to the Commission's sister agency – the Occupational Safety and Health Review Commission ["OSHRC"] – whose organizational structure and authority served as the models for those of the Commission.

Through the years, this Court has determined that deference is to be accorded statutory interpretations of the agency responsible for the administration of a statute and that the courts are not to intrude on that agency authority simply on the basis that it has another view of the meaning of a statute. When confronting a case of review of the statutory construction given by the administrative body ultimately charged with such interpretive authority, this Court has concluded that to uphold the administrative body's interpretation,

> "'. . . we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.'" *Udall* v. *Tallman*, 380 U.S. 1, 16, (1965), quoting *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946).

Moreover an administrative "practice has peculiar weight when it involves a contemporaneous construction of the statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); see, e.g., *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1969).

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[8] The error of this conclusion is particularly striking when the panel majority then proceeded to accord a great amount of deference to the Secretary's interpretation in MSHA's Interpretative Bulletin, 43 Fed. Reg. 17546 (April 25, 1978). *UMWA* v. *FMSHRC*, 671 F.2d at 626.

> The question is thus whether, in light of the normal aids to statutory construction, the . . . interpretation is "sufficiently reasonable" to be accepted by a reviewing court. *Train* v. *Natural Resources Defense Council* . . .
>
> *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978).

Also directly related to the particular circumstances of the present case – and in pointed conflict with the decision below – are the decisions of various Circuits related to the substantially identical circumstances involving the review of OSHRC rulings. In those instances, it has been concluded that courts should defer to OSHRC decisions, *even when* those decisions differ from the interpretation of the Secretary. *Bratton Corp.* v. *Occupational Safety and Health Review Commission*, 590 F.2d 273, 276 (8th Cir. 1979); *Diebold, Inc.* v. *Marshall*, 585 F.2d 1327, 1332 (6th Cir. 1978); *Marshall* v. *Knutson Construction Co.*, 566 F.2d 596, 600 (8th Cir. 1977); *Dunlop* v. *Rockwell International*, 540 F.2d 1283, 1289-1290 (6th Cir. 1976); *Budd Co.* v. *Occupational Safety and Health Review Commission*, 513 F.2d 201, 204-05 (3d Cir. 1975); *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261-1262 (4th Cir. 1974).

In *Gilles & Cotting*, the court aptly stated the grounds for such deference and was influenced appropriately by the facts that "Congress deliberately created the Commission separate and independent of the Secretary" and "the statute vests adjudicatory functions in the Commission." *Id.* at 1262. The court concluded that "the Commission [OSHRC] was designed to have a policy role and its discretion therefore includes some questions of law . . ." Otherwise, the court reasoned, the OSHRC would be "little more than a specialized jury, an agency charged only with fact finding." *Ibid.*

The Commission here, like the OSHRC, was Congressionally created to be separate and independent of the Secretary and is an adjudicative body vested by statute with the authority to make independent resolutions of questions of policy and statutory construction. It does not have merely a

"rubber stamp" function regarding the Secretary's practices and interpretations, and its decisions are worthy of some deference. The decision below subverts the authority Congress granted to the Commission.

Without intending to be presumptuous in predicting the results of deliberations of the judiciary, it is reasonable to conclude that the cases from the other Circuits suggest that those Courts would resolve the issues which were before the District of Columbia Circuit in this proceeding in a manner which conflicts with the decision below. The public interest will not be appropriately served by relegating the nation's mining industry to awaiting the several years for the development of a conflict of interpretation on the specific statute and on the typical facts present here, while bearing the substantial operational and financial burden, before appropriate judicial direction is given by this Court.

In this proceeding, the majority below not only refused to accord "great deference" to the statutory construction rendered by the Commission – in conflict with the decisions of this Court and of other Circuits – but also *refused* to accord *any deference* whatsoever to that construction. And, those refusals were predicated on the plain, but impermissible, basis of interposing the panel majority's own view of what the statute should provide – while admittedly ignoring the clear and unambiguous statements of Congressional intent as to the limits of the pay entitlement provisions of § 103(f) of the Act and the authority and responsibility of the Commission as expressed in the legislative history of the Act. Such judicial action warrants review on certiorari and reversal.

IV. CONCLUSION

For the foregoing reasons and those contained in the Petition for a Writ of Certiorari, it is respectfully submitted that a Writ of Certiorari should issue to the United States Court of Appeals for the District of Columbia Circuit and the Court of Appeals' decision should be reversed.

Respectfully submitted,

Alvin J. McKenna, Counsel of Record
David A. Morton, Of Counsel
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APPENDIX

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APPENDIX A

[LETTERHEAD OF CROWELL & MORING]

July 26, 1982

Mr. Alvin J. McKenna
Alexander, Ebinger, Fisher,
McAlister & Lawrence
11th Floor, Huntington Bank
Building
17 South High Street
Columbus, Ohio 43215

Re: The Helen Mining Company, et al v. Donovan, No. 82-33

Dear Al:

This will confirm that Petitioners, The Helen Mining Company and Kentland-Elkhorn Coal Corporation, have no objection to your filing an *amici curiae* brief in support of the petition for certiorari in this case.

Sincerely,

/s/ RICHARD McMILLAN, JR.
Richard McMillan, Jr.

APPENDIX B

[LETTERHEAD OF U.S. DEPARTMENT OF JUSTICE]
(Seal) Office of the Solicitor General

July 9, 1982

Alvin J. McKenna, Esquire
Alexander, Ebinger, Fisher, McAlister & Lawrence
11th Floor, Huntington Bank Building
17 South High Street
Columbus, Ohio 43215

Re: *Helen Mining Company and Kentland-Elkhorn Coal Corporation* v. *Federal Mine Safety and Health Review Commission, et al.*, 671 F.2d 615 (D. C. Cir. 1982).

Dear Mr. McKenna:

In response to your letter of July 7, 1982, I hereby consent, on behalf of the federal respondent, to the filing of a brief *amicus curiae* on behalf of the subsidiary corporations of American Electric Power Company in this case.

Sincerely,

/s/ REX E. LEE
Rex E. Lee
Solicitor General

APPENDIX C

PARENT AND AFFILIATES OF PROPOSED AMICI CURIAE

The following is provided in compliance with Supreme Court Rule 28.1. As noted in their Motion for Leave to File Brief *Amici Curiae*, Cedar Coal Company, Central Appalachian Coal Company, Central Ohio Coal Company, Price River Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Power House Coal Company are wholly owned subsidiaries of utility companies which are owned, in turn, by American Electric Power Company, Inc., a public utility holding company. The companies in the American Electric Power Company System which could be considered affiliates of the proposed *Amici Curiae* are:

- American Electric Power Service Corporation
- AEP Energy Services, Inc.
- AEP Generating Company
- Appalachian Power Company which, in addition to Cedar Coal Company, Central Appalachian Coal Company, and Southern Appalachian Coal Company, owns:
  - Central Coal Company (partially)
  - Central Operating Company (partially)
  - Kanawha Valley Power Company
  - West Virginia Power Company
- Columbus and Southern Ohio Electric Company which owns:
  - Colomet, Inc.
  - Simco, Inc.
- Franklin Real Estate Company which owns:
  - Indiana Franklin Realty, Inc.

- Indiana and Michigan Electric Company which, in addition to Price River Coal Company, owns:
  - Blackhawk Coal Company
- Kentucky Power Company
- Kingsport Power Company
- Michigan Electric Power Company
- Michigan Power Company which owns:
  - Michigan Gas Exploration Company
- Ohio Power Company which, in addition to Central Ohio Coal Company, Southern Ohio Coal Company, and Windsor Power House Coal Company, owns (partially):
  - Beech Bottom Power Company, Inc.
  - Cardinal Operating Company
  - Central Coal Company
  - Central Operating Company
- Ohio Valley Electric Corporation (partially owned) which owns:
  - Indiana-Kentucky Electric Corporation
- Twin Branch Railroad Company
- Wheeling Electric Company

APPENDIX D

UNITED STATES
DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION

Coal Mine Health and Safety Manual
For Orders, Citations and Report Writing

March 9, 1978

CHAPTER 1

• • •

8.0 INSPECTION ACTIVITY CODES

The Citation and Order Forms require the alphabetic code for the type of inspection on each citation and order issued. The following activity codes provide you with the appropriate information:

I. MANDATORY INSPECTIONS AND INVESTIGATIONS	
Title	*Descriptions*
(1) Safety & Health Inspections of entire mine, surface facility, or other entity with a separate I. D. Number.	

AAA - Safety & Health Inspection	Regular inspection of entire mine. This inspection shall cover the entire underground mine and its surface facilities and at a surface mine it includes the entire surface mine and its surface facilities
AAB - Safety & Health (Saturation) Inspection	Regular inspection conducted by a team of inspectors. If a saturation inspection is part of or results in a regular inspection, it shall be reported under this code.
(2) Safety & Health 103(i) Spot Inspection of any area of a mine, surface facility or other entity.	
ABA - 103(i) Spot (Ignition or Explosion) Inspection	Spot inspection at a mine classified as having had an ignition or explosions which resulted in death or serious injury within the past five years.
ABB - 103(i) Spot (Hazard) Inspection	Spot inspection at a mine where there exists other especially hazardous conditions.
ABC - 103(i) Spot (5-day) Inspection	Spot inspection at a mine which liberates more than one million cubic feet of methane or other explosive gases during a 24-hour period.

ABD - 103(i) Spot (10-day) Inspection	Spot inspection at a mine which liberates more than 500,000 but less than one million one cubic feet of methane or other explosive gases during a 24-hour period.
ABE - 103(i) Spot (15-day) Inspection	Spot inspection of a mine which liberates more than 200,000 but less than 500,001 cubic feet of methane or other explosive gases in a 24-hour period.
(3) Safety & Health (Reopening) Inspection	
ACA - Reopening Inspection	Inspection of an entire mine when reopened after having been abandoned or declared inactive.
(4) 103(g) Spot Inspections	
ADA - 103(g)(1) Spot Inspection	Spot inspection resulting from a written complaint from a representative of miners or a miner.
ADB - 103(g)(1) Spot UM WA Inspection	Spot inspection resulting from a written complaint involving a safety or health dispute under National Bituminous Coal Wage Agreement or Anthracite Wage Agreement.
ADC - 103(g)(2) Spot Inspection	To be developed by the Secretary at a later date.

(4) Safety & Health Technical Investigations	
AEA - Toxic Substance or Harmful Physical Agent Investigation	Investigation of a reported problem or potential problem with any toxic substance or harmful physical agent.
AEB - Section 101(c) Petition Investigation	Investigation pertaining to a request for modification of a mandatory safety standard.
AEC - Section 101(d) Petition Investigation	Investigation of activities pertaining to a person who may be adversely affected by a mandatory health or safety standard promulgated under this section.
(5) Safety & Health (Accident) Investigations	
AFA - Fatal Accident Investigation	Investigation of a fatal accident.
AFB - Nonfatal Injury Accident	Investigation of an accident where a nonfatal injury occurred.
AFC - Non Injury Accident investigation	Investigation of an accident where no injury occurred.
(6) Safety & Health (Special Investigator) Investigations	
AGA - Special Investigator Investigation	Investigation by a Special Investigator or his alternative who accompanies investigation teams.

AGB - Special Investigator Willful Violation Investigation	Investigation of citations and orders where there is willful intent.
AGC - Special Investigator Discrimination Investigation	Investigation of a discrimination complaint submitted to MSHA.
II. POLICY INSPECTIONS AND INVESTIGATIONS (1) Safety & Health (MSHA) Policy Inspections	
BAA - Ventilation (Saturation) Inspections	Simultaneous inspection of all or parts of a mine by a team of ventilation specialists and/or regular inspection personnel. Record the area or areas inspected under item V on form 2000-22.
BAB - Respirable Dust Technical Inspection	Inspection of an *underground* mine where full-shift samples are collected to evaluate the dust control plan. Record the area or areas inspected under item V on form 2000-22.
PAC - Shaft, Slope, or Major Construction Spot Inspection	Spot inspection made of shaft, slope, or major construction sites to determine whether an imminent danger exists and whether there is compliance with safety and health standards or any citations or order issued.

BAD - Code-A-Phone Spot Inspection	Spot inspection resulting from a code-a-phone complaint.
(2) Safety & Health (MHSA) Policy Investigations	
BBA - Electrical Investigation	An investigation concerning an indepth study of any electrical components and/or systems. Includes field changes on electrical face equipment, electrical activities prior to opening a new mine or the reopening of an inactive or abandoned mine, trolley surveys, circuit breaker studies, ground monitor checks, and other special electrical investigations.
BBB - Noise Technical Investigation	Investigation concerning the operator's noise program. Includes all supplemental noise level surveys.
BBC - Other Special Investigator Investigation	Investigation made when requested, that is not related to any violation or active case.
BBD - Mine Profile Investigation	A mine audit under the profile rating system guidelines.
BBE - ATF Technical Investigation	Investigation made for manufacturers, dealers, or user permits or license; any special investigation made for ATF compliance or problems where

	it is suspected that explosives are involved. Routine inspections of explosive facilities shall not be included under this title.
III. AUXILIARY INSPECTIONS AND INVESTIGATIONS AND POLICY REQUIREMENTS.	(Activities supportive to mandatory)
(1) Safety and Health Spot Inspections	
CAA - Spot Inspection	Spot inspection at a mine to determine whether an imminent danger exists, and whether there is compliance with safety and health standard or with any citation or order issued.
CAB - Saturation Spot Inspection	Spot inspection conducted by a team of inspectors of an area(s) at a problem mine, or other mine so designated by the District or Subdistrict Manager.
(2) Safety & Health Electrical Inspections	
CBA - Electrical Inspection	An electrical inspection of an entire mine.
CBB - Electrical Saturation Inspection	Inspection conducted by a team of inspectors of area(s) of a mine.

CBC - Electrical Spot Inspection	Spot inspection of a mine's electrical system.
(3) Safety & Health Technical Inspections	
CCA - Roof Control Technical Inspection	Inspection of roof conditions for plan evaluation and compliance conducted by a specialist.
CCB - Haulage Technical Inspection	Inspection of a haulage system. A haulage inspection which is part of a regular inspection shall not be reported under this code.
CCC - Ventilation Technical Inspection	Air quality surveys which are not a detailed engineering study of a mine ventilation system and inspections for ventilation plan evaluations and compliance are reported under this code.
CCD - Noise Technical Inspection	Inspection for noise plan evaluation. Noise complaints and supplemental noise level surveys shall not be reported under this code but should be reported under the technical investigation title (Code BBB).
CCE - Water Sediment or Slurry Impoundment Technical Inspection	Inspection of impoundments made by a specialist. An impoundment inspected as part of a regular inspection shall not be reported under this code.

CCF - Waste Pile Technical Inspection	Inspection of a waste pile made by a specialist. A waste pile inspected as part of a regular inspection shall not be reported under this code.
(4) Safety & Health Hazards Analysis Accident Prevention Inspections	
CDA - HAAP Inspection	Routine inspection made by HAAP inspectors.
(5) Safety & Health Technical Investigations	
CEA - Roof Control Technical Investigation	Engineering or in-depth study of a roof problem or potential roof problem in a mine. Includes roof control surveys, pull tests, etc.
CEB - Haulage Technical Investigation	Investigation of haulage activities. Includes haulage activities such as surveys and investigations for clearance waivers, etc.
CEC - Ventilation Technical Investigation	Detailed engineering study of ventilation problems or potential ventilation problems. Includes ventilation surveys, investigations for waiver requests, etc.
CED - Respirable Dust Technical Inspection	Investigation concerning the operator sampling program where samples may or may not be collected. Includes investigations of 230(b) miners.

CEE - Free Silica Technical Investigation	Investigation where additional respirable dust samples are collected for a free silica analysis.
CEF - Other Technical Investigation	Investigations not classified above.
(6) Safety & Health Other Activities.	
CFA - Mine Idle	Inspector attempting to make an inspection and finds mine idle.
CFB - ADP Contact	Mine visits involving the Automatic Data Processing System and the mine operator's respirable dust sampling program.
CFC - Other Contacts	Includes technical assistance visits for plan evaluations and other contacts not classified by one of the codes in this schedule. These are office visits not mine inspections or investigations.

APPENDIX E

[LETTERHEAD OF U.S. DEPARTMENT OF LABOR]

March 16, 1982 (SEAL)

MEMORANDUM FOR: AUREL GOODWIN
JOSEPH LAMONICA
MADISON McCULLOCH
HARRISON COMBS
JOHN ENGLISH
WAYNE VENEMAN
PAT SILVEY
CYNTHIA ATTWOOD

FROM: FORD B. FORD /s/ Ford B. Ford
Assistant Secretary for Mine Safety and Health

SUBJECT: Walkaround Compensation for "Spot Inspections"

The US. Court of Appeals for the District of Columbia Circuit recently issued a decision in *United Mine Workers of America* v. *Federal Mine Safety and Health Review Commission* (No. 79-2503 *et al.*), holding that, under Section 103(f) of the Mine Act, miners are entitled to participate in both "spot inspections" and "regular inspections" without suffering any loss of pay. This decision reverses the Federal Mine Safety and Health Review Commission's *Helen Mining Co.* (Docket No. PITT 79-11-P) and *Kentland-Elkhorn Coal Corp.* (Docket No. PIKE 78-399) decisions. As you know, following the Commission's decision in *Helen Mining and Kentland-Elkhorn*, my predecessor announced that until further notice MSHA inspectors should cease issuing citations if a mine operator refused to compensate the representative of miners for time spent during any inspection other than a "regular" inspection. Pending further consideration of this issue, we are now conforming our practices to the Court of Appeals' decision, and operators should be informed of their responsibilities regarding miner participation and compensation in light of that decision.

APPENDIX F

Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a):

> Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirement of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

APPENDIX G

Section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(f):

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.